UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

LABOR READY SOUTHWEST, INC., A SUBSIDIARY OF TRUEBLUE, INC.

and

Case 31-CA-072914

JASON KULLER, ESQ. of THIERMAN LAW FIRM, P.C.

Rudy I. Fong-Sandoval, Esq., Los Angeles, CA, for the General Counsel Jason D. Winter, Esq., Reminger Co., LPA. Cleveland, OH, for the Respondent

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: This matter is based on a stipulated record. The charge in this matter was filed on January 17, 2012. Since the submission of this matter to me on about February 13, 2014 briefs have been received from Counsel for the General Counsel (General Counsel), and counsel for the Respondent. Upon the stipulated record, and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

At all material times Labor Ready Southwest, Inc., a Subsidiary of Trueblue, Inc., (Labor Ready or Respondent), has been a corporation with an office and place of business in North Hollywood, California and has been engaged in the business of providing temporary workers. During the year ending December 31, 2013 the Respondent performed services valued in excess of \$50,000 in states other than California. At all material times, the Respondent has been an employer engaged in commerce within the meaning of the National Labor Relations Act.

II. Alleged Unfair Labor Practices

A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement; and whether the language of the mandatory arbitration agreement restricts employees from access to the Board and its processes.

10 B. Facts

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Labor Ready provides temporary job assignments that help workers bridge the gap between unemployment and permanent employment. Individuals come to Labor Ready seeking to be placed on a job assignment for Labor Ready's customers on a day-to-day basis. In order for Labor Ready to place workers in job assignments, Labor Ready requires applicants for employment to sign a Labor Ready employment application agreeing to terms contained therein.

Jeffrey Lee Allen (Allen) is a former employee of Labor Ready on whose behalf the instant charge was filed. Allen obtained work through Labor Ready from about June 1, 2007 until January 9, 2009 on approximately 50 occasions. Prior to his employment with Labor Ready, as a condition of employment, Allen filled out and signed a Labor Ready application for employment (application for employment) on May 31, 2007 that included a mandatory arbitration provision. Allen left the Respondent's employ on good terms, and with a good reputation for hard work.

The relevant language of Respondent's mandatory arbitration provision reads:

I agree that any disputes arising out of my application for employment or employment that I believe I have against Labor Ready or its agents or representatives, including, but not limited to, any claims related to wage and hour laws, discrimination, harassment or wrongful termination, and all other employment related issues (excepting only actions arising under the NLRA) will be resolved by final and binding arbitration under the Federal Arbitration Act. Except where prohibited by law, I agree to bring any disputes I may have as an individual and I waive any right to bring or join a class, collective, or representative action.

After leaving Labor Ready, on April 30, 2009, Allen, as named Plaintiff, filed a lawsuit against Labor Ready in the Superior Court of the State of California, County of Los Angeles, on behalf of himself and all other similarly situated employees. On September 28, 2011, after litigation of a number of motions from each side of the lawsuit, Labor Ready filed a Motion to Compel Arbitration based on Allen's application for employment, seeking "an order compelling the arbitration of Plaintiff's claims against it on an individual basis." On about October 28, 2011, Allen's legal counsel filed an opposition to Labor Ready's Motion to Compel Arbitration. In

November 2011, the state trial court granted Labor Ready's Motion to Compel Arbitration, and ordered individual arbitration of Allen's class action lawsuit.

The parties to the lawsuit, after protracted negotiations, came to a resolution of all their claims. On August 27, 2013, U.S. District Court Judge Dean Pregerson issued an Order granting Final Approval of Class Action Settlement. Thereafter, the Charging Party herein submitted a withdrawal request in the instant matter. The Regional Director for Region 31 refused to approve the withdrawal request of the unfair labor practice charge in this matter on the basis that the foregoing resolution and settlement of the underlying civil action between the parties did not remedy the section 8(a)(1) violations alleged in the instant complaint.

The stipulation in this matter presents two issues, as follows:

ISSUE1: Whether the mandatory arbitration agreement contained in Labor Ready's Application for Employment signed by Allen, the subject of Labor Ready's September 28, 2011 Motion to Compel Allen to individual arbitration, violates Section 8(a)(1) of the Act by mandating individual arbitration of employment-related claims, as alleged in the complaint.

ISSUE 2: Whether the mandatory arbitration agreement contained in Labor Ready's Application for Employment signed by Allen, the subject of Labor Ready's September 28, 2011 Motion to Compel Allen to individual arbitration, violates Section 8(a)(1) of the Act by restricting access to the Board and its processes, as alleged in the complaint.

Analysis and Conclusions

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D.R. Horton, Inc., 357 NLRB No, 184 (2012) is the controlling Board decision in this matter. The Respondent maintains that *D. R Horton* was wrongly decided, and in its comprehensive brief significantly relies upon the recent Fifth Circuit decision which considers and discusses many of the arguments raised by the Respondent, which need not be reexamined herein, and denies enforcement of *D.R. Horton* in material respects. However, I am required to follow *D.R. Horton* unless reversed by the Supreme Court. *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hosp.,* 244 NLRB 960, 962 fn. 4 (1979), enforced 640 F2d 1017 (9th Cir. 1981); *Pathmark Stores, Inc.,* 342 NLRB 378, fn. 1 (2004).

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The Board determined in *D. R. Horton* that as a condition of employment "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial." 357 NLRB No. 184, slip op. at p. 12 (2012). As the mandatory arbitration provision by its terms restricts employees, as a condition of their employment, from acting concertedly by pursuing arbitral and judicial litigation of employment claims, I find that it is facially unlawful.

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The complaint alleges and the General Counsel in his brief argues that the mandatory arbitration agreement also violates Section 8(a) (1) of the Act by restricting access to the Board and its processes. I agree. While, as the Respondent argues, certain language does not restrict an employee from filing "actions arising under the NLRA," nevertheless other language may reasonably be construed by employees to restrict them from concertedly filing collective charges under the NLRA. Thus the language "Except where prohibited by law, I agree to bring any

¹ D.R. Horton, Inc. v NLRB, 737 F.3d 344 (5th Cir. 2013).

disputes I may have as an individual..." would, I find, reasonably inhibit collective action among employees before the National Labor Relations Board, as the quoted language expressly permits employees to pursue only individual disputes while, in effect, simultaneously requiring them to investigate and determine whether the limitation—only individual disputes—applies to matters under the NLRA. It is reasonable to assume that the ambiguity itself, coupled with the added effort necessarily involved in resolving the ambiguity, would dissuade employees from collectively seeking redress for grievances they may have with the Respondent, and thus would inhibit them from pursuing collective action. As noted in *Ingram Book Co.*, 315 NLRB 515, 516 n.2 (1994), "Rank-and-file employees do not generally carry law books to work or apply legal analysis to company rules ... and cannot be expected to have the expertise to examine company rules from a legal standpoint." See also, *Allied Mechanical*, 349 NLRB 1077, 1077 n. 1, 1084 (2007). Accordingly, I find that the mandatory arbitration agreement restricts collective access to the Board and its processes in violation of Section 8(a)(1) of the Act as alleged.

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The Respondent also maintains that the complaint should be dismissed on the basis that the matters underlying the class action lawsuit have been fully resolved and, moreover, the Charging Party has submitted a withdrawal request and is no longer interested in pursuing this Board proceeding against the Respondent. However, it is clear that the resolution of the class action lawsuit does not encompass or resolve the rights protected by the NLRA as enunciated in D. R. Horton. As stated by the Board in Alberci Fruin-Colnon, 226 NLRB 1315, 1316 (1976), "Once a charge is filed, the General Counsel proceeds, not in vindication of private rights, but as the representative of an agency entrusted with the power and duty of enforcing the Act in which the public has an interest, and dismissal does not lie as a matter of right should the charging party seek the charge's withdrawal." I find no merit to this argument of the Respondent.

The Respondent maintains the Board did not have the authority to decide *D. R. Horton* due to the recess appointment matter regarding the composition of the Board. *See Noel Canning V. NLRB*, 705 F.3d 490, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013). Moreover, the Respondent contends that the complaint is invalid as a result of the interim appointment of the Regional Director who issued the instant complaint. These matters are currently being considered in other forums. The Board has noted that that until such matters are ultimately decided it shall continue to fulfill its responsibilities under the Act. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn. 1 (March 13, 2013): *Universal Lubricants, LLC*, 359 NLRB No. 157, slip op. 1, fn.1 (July 16, 2013).

On the basis of the foregoing, I find the Respondent has violated and is violating Section 8(a)(1) of the Act as found herein. ²

Conclusions of Law and Recommendations

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 2. The Respondent has violated Section 8(a) (1) of the Act as found herein.

² As noted, the stipulation of the parties specifies two issues for resolution, and does not appear to include the complaint allegation that the Respondent unlawfully attempted to enforce the mandatory arbitration agreement before the Superior Court of the State of California.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix," at the locations where the Agreement has been in effect

ORDER³

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The Respondent, Labor Ready Southwest, Inc., A Subsidiary of Trueblue, Inc, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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(a) Maintaining the mandatory arbitration agreement that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.

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(b) Maintaining the mandatory arbitration agreement that restricts collective access to the Board and its processes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act:

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(a) Rescind or revise the mandatory arbitration agreement that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.

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(b) Rescind or revise the mandatory arbitration agreement that restricts collective access to the Board and its processes.

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(c) Advise all employees, by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, that the mandatory arbitration agreement has been rescinded or revised and that employees are no longer prohibited from bringing and participating in class action lawsuits against the Respondent.

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³ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (d) Advise all employees, by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, that the mandatory arbitration agreement has been rescinded or revised and that employees are no longer prohibited from collectively filing charges and collectively participating in matters before the National Labor Relations Board.
 - (e) Within 14 days after service by the Region, post at all locations where notices to employees are customarily posted, and transmit to employees by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted and electronically transmitted to employees immediately upon receipt thereof, and shall remain posted for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that the posted notices are not altered, defaced, or covered by any other material.
 - (f) Within 21 days after service by the Regional Office, file with the Regional Director for Region 31 sworn certifications of responsible officials on forms provided by the Region attesting to the steps that Respondent has taken to comply.

25 Dated, Washington, D.C. April 29, 2014

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Gerald A. Wacknov
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection

WE WILL NOT maintain a mandatory arbitration agreement that requires employees to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial regarding employment-related matters.

WE WILL NOT maintain a mandatory arbitration agreement that restricts collective access among employees to the National Labor Relations Board or its processes.

WE WILL rescind or revise the mandatory arbitration agreement to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions, and that the agreement does not prohibit employees from collectively bringing and pursuing matters before the National Labor Relations Board.

WE WILL notify employees of the rescinded or revised agreement, and provide them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

			INC, A SUBSIDIARY OF TRUEBLUE, Inc. (Employer)
Dated	Ву		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To

find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064-1824 (310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-072914 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.